IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 14, 2006

STATE OF TENNESSEE v. GARY JONES

Direct Appeal from the Circuit Court for Williamson County
No. I-8407 Russ Heldman, Judge

No. M2005-00674-CCA-R3-CD - Filed July 6, 2006

Following a jury trial, Defendant, Gary Jones, was found guilty of the delivery of more than 0.5 grams of cocaine, a Class B felony. Relying on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the trial court conducted a bifurcated sentencing hearing in which enhancement factors were submitted to the jury. The jury found that enhancement factor (3), Defendant was a leader in the commission of the offense, and enhancement factor (17), the offense was committed under circumstances under which the potential for bodily injury to a victim was great, were applicable. The trial court, in a separate proceeding outside the presence of the jury, found that enhancement factor (2), Defendant has a prior history of criminal convictions in addition to those necessary to establish the appropriate range, and enhancement factor (9), Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community were appropriate considerations. Based upon the presence of four enhancement factors, the trial court sentenced Defendant to twelve years. In his appeal, Defendant argues that (1) the evidence is insufficient to support his conviction; (2) the trial court's comments during Defendant's closing argument deprived Defendant of his right to a fair trial; (3) the fine assessed against Defendant was excessive; (4) the trial court erred in conducting a bifurcated sentencing hearing; and (5) the trial court erred in considering certain enhancement factors in determining the length of Defendant's sentence. After review, we affirm Defendant's conviction of the delivery of more than 0.5 grams of cocaine. Although the trial court erred in conducting a bifurcated sentencing hearing, we conclude that such error was harmless error, and affirm the judgment of the trial court.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which and DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

John H. Henderson, District Public Defender, Franklin, Tennessee, for the appellant, Gary Jones.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General, Ronald L. Davis, District Attorney General; and Christina Goodson, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Agent Chris Mobley, with the Williamson County Sheriff's Department, was on assignment to the 21st Judicial District Drug Task Force in March 2003. Agent Mobley testified that the task force had received complaints that "open-air" drug sales were being made at Joe Kelly's Market in Williamson County, and he arranged for Sylvester Island, a confidential informant, to attempt to purchase a controlled substance at that location. Agent Mobley and Agent Rick Campbell searched Mr. Island and his vehicle, and gave Mr. Island $100 with which to purchase drugs. Mr. Island was equipped with a body wire, transmitter and recorder, and a video recording device was placed in his vehicle.

Agent Mobley said that Defendant was sitting in a truck outside the market when Mr. Island arrived. Mr. Island asked Defendant where he could purchase either cocaine or marijuana, and Defendant told Mr. Island to go to Patterson Road in Williamson County. Defendant started to give Mr. Island directions to the location, but Mr. Island asked Defendant to ride with him and show him the exact location. Defendant got into Mr. Island's vehicle, and the two men drove to Patterson Road. Agents Mobley and Campbell followed Mr. Island's vehicle and continued to monitor the transaction.

When Defendant and Mr. Island arrived at the location on Patterson Road, a man later identified as Jamie Earl Rucker, approached the passenger side of Mr. Island's vehicle. Mr. Island told Mr. Rucker that "he was looking to spend $100." Mr. Rucker leaned into the window over Defendant and said, "I've got some crack cocaine; give me something to put it in." Mr. Island examined the crack cocaine and gave Mr. Rucker $100 in exchange for the drugs. On the way back to Joe Kelly's Market, Defendant told Mr. Island, "Now I've done you a favor; now you can do me a favor." Mr. Island told Defendant he would have to drop him off at the market and come back later.

After Mr. Island left Defendant at the market, he drove to the pre-arranged meeting site and gave the crack cocaine to the agents. A second search of Mr. Island and his vehicle did not reveal any contraband. Agent Mobley said that he did not initially know Defendant's identity, but another agent was able to provide Defendant's name. Mr. Island subsequently identified Defendant from a photograph as the man who accompanied him to Patterson Road.

Glen Everett, a forensic chemist with the T.B.I. crime laboratory, testified that the substance purchased by Mr. Island from Mr. Rucker was crack cocaine and weighed 1.5 grams.

Mr. Island testified that he had previously worked with the 21st Judicial District Drug Task Force on several occasions. Mr. Island confirmed that he and his vehicle were searched before he drove to Joe Kelly's Market, and Mr. Island agreed to be fitted with the monitoring equipment.

Mr. Island said that Defendant was sitting in a truck outside Joe Kelly's Market when he drove up. Mr. Island asked Defendant, "You know where I can find anything?" Defendant replied affirmatively and got into Mr. Island's vehicle to direct him to the location. They drove to a trailer on Patterson Road, and Defendant called Mr. Rucker over to Mr. Island's vehicle. Mr. Island said that Mr. Rucker sold him crack cocaine for $100.00. Mr. Rucker gave Mr. Island his girlfriend's telephone number in case Mr. Island needed to contact him again. Mr. Island said that he would not have been able to find Mr. Rucker's trailer if Defendant had not accompanied him.

Mr. Island took Defendant back to Joe Kelly's Market and let him out. Mr. Island testified that Defendant told him he could introduce Mr. Island to another drug dealer, and Mr. Island said he would return in thirty or forty minutes. Defendant asked Mr. Island to give him either money or cocaine for helping Mr. Island find a drug dealer.

On cross-examination, Mr. Island said that he had been a confidential informant for approximately seventeen years. Mr. Island acknowledged that he did not know who would be at the market when he arrived. At the conclusion of Mr. Island's cross-examination, the trial court asked Mr. Island if he knew the man at the trailer who had possession of the cocaine. Mr. Island responded that "[it] was a guy by the name of Little J." Mr. Island then stated that "Little J" gave Defendant "some [cocaine] for turning me on to him; like, he brought a sale to him."

On further cross-examination by defense counsel, Mr. Island explained that Defendant "wanted something for bringing me to him – to this guy to buy this cocaine; that [Mr. Rucker] was using [Defendant] as a runner; [Defendant] brings people to buy from this guy here. And [Defendant] got a $20 "rock" for doing this." Mr. Island said that when Mr. Rucker backed out of his vehicle, Defendant had "crack in his hands." Mr. Island acknowledged that there was no conversation between Mr. Rucker and Defendant concerning this part of the transaction.

Agent Campbell confirmed during his direct examination that Mr. Island and his vehicle were searched before and after the transaction, and no contraband was found. Agent Campbell identified Defendant as the person with whom Mr. Island met at Joe Kelly's Market.

The defense recalled Agent Mobley who acknowledged that Mr. Island's trial testimony was the first time he had heard that Defendant received a $20.00 rock of cocaine for his role in the drug purchase.

II. Sufficiency of the Evidence

Defendant argues generally that the evidence was insufficient to support his conviction. When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption

of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Defendant was convicted of knowingly delivering more than 0.5 grams of cocaine, a Schedule II controlled substance. *See* T.C.A. § 39-17-417(a)(2). "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." *Id*. § 39-17-402(6).

In *State v. Kevin Thompson*, No. 02C01-9202-CC-00035, 1992 WL 368654 (Tenn. Crim. App., at Jackson, Dec. 16, 1992), a panel of this Court defined "constructive delivery" as "'the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the insistence or direction of the defendant.'" *Id*., 1992 WL 368654, at *2 (quoting *Davila v. State*, 664 S.W.2d 722, 724 (Tex. Cr. App. 1984)). In *State v. Thornton*, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999), the confidential informant contacted the defendant to arrange for the purchase of drugs. The defendant directed the confidential informant to meet with his son, and the defendant arranged the meeting at which the sale took place. Based on these circumstances, this Court concluded that "there is ample evidence to conclude that, at a minimum, a constructive delivery took place." *Id*. at 234; *see also State v. Mary Lee Dillihunt*, No. W2002-00843-CCA-R3-CD, 2003 WL 21338966, at *3 (Tenn. Crim. App., at Jackson, May 16, 2003) (Evidence sufficient to support a finding of constructive delivery when the defendant rode with the confidential informant in order to direct her to the location of the seller, took the confidential informant's money into the seller's house, and returned with the drugs).

In the case *sub judice*, as in *Kevin Thompson* and *Thornton*, Defendant did not take any money from Mr. Island or physically deliver the drugs to him. Defendant, however, orchestrated the delivery of cocaine to Mr. Island by providing him with the name of a seller, directing him to the seller's location, and introducing Mr. Island to the seller. Agent Everett confirmed that the crack cocaine sold to Mr. Island weighed 1.5 grams. We conclude that there is sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Defendant constructively delivered the cocaine to Mr. Island. Defendant is not entitled to relief on this issue.

The State argued as an alternative theory that Defendant was guilty of the offense of delivery of more than 0.5 grams of cocaine under a theory of criminal responsibility. Although the proof is sufficient to support Defendant's conviction of the charged offense as a principal based on the

constructive delivery of the cocaine, there is also sufficient evidence to support a finding of guilt under the theory of criminal responsibility.

A defendant may be convicted of the commission of an offense under a theory of criminal responsibility. *See* T.C.A. § 39-11-401(b). Criminal responsibility is not a separate offense but "solely a theory by which the State may prove the defendant's guilt of the alleged offense, . . . based upon the conduct of another person." *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999). A person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" T.C.A. § 39-11-402(2).

Viewing the evidence in a light most favorable to the State, Defendant directed Mr. Island to Mr. Rucker's trailer so that Mr. Island could purchase drugs from Mr. Rucker. Defendant was present during the transaction between Mr. Island and Mr. Rucker. Mr. Island testified that when Mr. Rucker pulled away from Mr. Island's vehicle, Defendant had some "crack in his hands." Defendant offered to introduce Mr. Island to other drug dealers and demanded money or drugs for his assistance. This evidence is sufficient to support Defendant's conviction of the delivery of more than 0.5 grams of cocaine under a theory of criminal responsibility. *See State v. Mickens*, 123 S.W.3d 355, 391 (Tenn. Crim. App. 2003) (It is not necessary that the defendant take a physical part in the commission of the crime; "mere encouragement of the principal will suffice"); *State v. Crenshaw*, 64 S.W.3d 374, 384 (Tenn. Crim. App. 2001) ("To be criminally responsible for the acts of another, a defendant must 'in some way associate himself with the venture, act with knowledge that an offense is to be committed and share in the criminal intent of the principal in the first degree'") (citations omitted).

III. Trial Court's Comments during Closing Argument

Defendant argues that the trial court improperly and unnecessarily interrupted his counsel twice during closing argument thereby denying Defendant his Sixth Amendment right to a fair trial. During closing argument, defense counsel explained to the jurors that the trial court's charge to the jury can be difficult to understand:

> [DEFENSE COUNSEL]: It's not easy, and you go through [the charge] and you look at it; it's all there, but there might be a question that you have that you don't understand something. Sometimes it's there, but these charges – and I've said this before and I've heard other judges say it – are not written for the benefit of the jury; they're written for the benefit of the appellate court which say this is what you are to say and let the jury know. So if I can say anything that would make your job easier, I certainly will try to do so.

[THE COURT]: Well, I need to say for purposes of keeping the record clear that I am not one of those judges. This is the jury charge which is charged to you and it is the law, and you are charged to follow the law. But go ahead [defense counsel], for the record.

[DEFENSE COUNSEL]: I didn't quite understand Your Honor's comments.

[THE COURT]: Well, I've already – I've said all I need to say.

[DEFENSE COUNSEL]: Okay. I don't think I misstated anything; that's all I'm trying to say, and I certainly don't intend to.

The trial court's second comment occurred during defense counsel's explanation of the bifurcated sentencing hearing that was going to be conducted after the guilt phase of Defendant's trial.

[DEFENSE COUNSEL]: Now, when I started practicing up until, I think 1982 – and it was modified in '89 – we did not – the jury made the decision. You would sit here and you would evaluate whether there was guilt of a certain offense, and some of you might feel you're guilty of one offense, some others, there might be a compromise, but the whole thing is that once you found a person, say, guilty of an offense, then you would punish the person. That's not done under our system of law. This falls within the prerogative of the judge at a later time.

[THE COURT]: Hold on, [defense counsel]. I'm going to ask the jury to disregard that statement; okay that last statement. Carry on.

[DEFENSE COUNSEL]: All right. We have a new procedure here today; it's a little difficult to follow it. I just want to say that and no more.

After the jury retired for deliberations, defense counsel made an objection on the record to the trial court's comments.

"Because argument of counsel is a valuable privilege that should not be unduly restricted, our courts give wide latitude to counsel in arguing their position in a case to the jury, and the action of a trial judge in controlling arguments of counsel will not be reversed absent an abuse of

discretion." *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1978) (citing *Smith v. State*, 527 S.W.2d 737 (Tenn. 1975)). Counsel's closing argument, however, "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues tried." *State v. Hall*, 976 S.W.2d 121, 158 (Tenn. 1998). Although a trial judge has broad discretion in controlling the course and conduct of a trial, "he or she must be careful not to express any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial." *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994). Any comments by the trial court during the course of the trial, however, must be construed in the context "of all of the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case." *State v. Boggs*, 932 S.W.2d 467, 472 (Tenn. Crim. App. 1996).

Neither of the challenged comments by the trial court during defense counsel's closing argument contain any inferences or statements indicating a partiality on the merits of the case. In both instances, the trial court was exercising its discretion to control closing argument. In the first instance, the trial court correctly stated that the jury is charged to follow the law in response to defense counsel's suggestion that the drafting of the charge to the jury has some purpose other than instructing the jury as to the law of the case. *See State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990) (The trial court has the duty to provide a complete and accurate charge to the jury).

In the second example cited by Defendant, defense counsel's comments concerning the upcoming bifurcated sentencing hearing, with which he objected, were improper and beyond the scope of argument. *See* T.C.A. § 40-35-201(a) (In all contested criminal cases, the issue of guilt or innocence is submitted to the trier of fact for a verdict on that issue alone)*; see also Coker v. State*, 911 S.W.2d 357, 368 (Confusing or irrelevant arguments should not be permitted).

Based upon our review, we find no abuse of discretion. Defendant is not entitled to relief on this issue.

IV. Excessive Fine

Defendant argues that he is indigent, and the $75,000 fine imposed by the jury is excessive. A defendant convicted of the delivery of 0.5 grams or more of cocaine may be fined not more than $100,000. T.C.A. § 39-17-417(c)(1). Tennessee Code Annotated section 40-35-301 provides that "[w]hen imposing sentence, after the sentencing hearing, the court shall impose a fine, if any, not to exceed the fine fixed by the jury." The imposition of a fine, within the limits set by the jury, is to be based on the factors provided by the 1989 Sentencing Reform Act, the defendant's ability to pay, and "other factors of judgment involved in setting the total sentence." *State v. Bryant*, 805 S.W.2d 762, 766 (Tenn. 1991). Thus, although the defendant's ability to pay is one factor to consider, it is not the only one, nor is it necessarily controlling. *State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). In the instant case, the trial court did not indicate on the record that it considered the applicable factors in approving the fine. Thus, this Court is not bound by the presumption of correctness on appeal. *See State v. Steven Andrew Tidwell*, No. W2004-01820-CCA-R3-CD, 2005 WL 1707979, at *8 (Tenn. Crim. App., at Jackson, July 21, 2005), *perm. to app.*

denied (Tenn. Dec. 5, 2005); *State v. Franklin Darnell Brown, Jr.*, No. W2003-01863-CCA-R3-CD, 2004 WL 2083925, at *6 (Tenn. Crim. App., at Jackson, Sept. 16, 2004), *no perm. to appeal filed*.

Nonetheless, the record does not establish why the fine is excessive. According to Defendant's presentence report, he has thirteen prior misdemeanor convictions, including three convictions for unlawful possession of drug paraphernalia, and two simple possession drug convictions. Defendant was convicted of a felony drug charge in 1990 under the name "Marcus Gary Jones." He was placed on probation for that offense, and a violation of probation warrant was issued on July 19, 1991. The warrant was not served until 2003, however, because all of Defendant's subsequent convictions were under the name "Gary L. Jones," and it appears that Defendant changed the last two digits of his social security number when he assumed the name "Gary L. Jones." Defendant was initially untruthful about his prior felony conviction during the preparation of the presentence report. In addition to his outstanding warrant of violation of probation, two of Defendant's probated sentences have been previously revoked. Defendant stated in the presentence report that he graduated from Page High School in Franklin, Tennessee, and has held several jobs, although it appears from the report that he exaggerated the length of his employment with two of his employers. Upon consideration of the record, the principles of the Sentencing Reform Act, and Defendant's apparent lack of amenability to rehabilitation, a fine of $75,000 is neither inappropriate nor unfair. Defendant is not entitled to relief on this issue.

V. Bifurcated Sentencing Hearing

Relying on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the trial court conducted a bifurcated sentencing proceeding, over defense counsel's objection, during which the court submitted four proposed enhancement factors to the jury for their determination. At the time of Defendant's sentencing hearing, various panels of this Court had maintained that *Blakely* "calls into question the continuing validity of our current sentencing scheme." *See e.g., State v. Julius E. Smith*, No. E2003-01059-CCA-R3-CD, 2004 WL 1606998, at *4 (Tenn. Crim. App., at Knoxville, July 19, 2004), *no perm. to appeal filed*. Shortly after Defendant's notice of appeal was filed on March 15, 2004, the Supreme Court issued its opinion in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). In *Gomez*, the Supreme Court concluded that Tennessee's sentencing structure "merely requires judges to consider enhancement factors," and unlike the sentencing guidelines struck down in *Blakely*, Tennessee "does not mandate an increased sentence upon a judge's finding of an enhancement factor." *Id*. at 661. Accordingly, the court held that the Tennessee Sentencing Reform Act does not violate the Sixth Amendment guarantee of a jury trial and is, thus, not affected by the *Blakely* decision.

In his appeal Defendant argues that the trial court erred in conducting a bifurcated sentencing hearing, and that the evidence does not support the jury's finding that enhancement factors (3), Defendant was a leader in the commission of the offense, and (17), the crime was committed under circumstances under which the potential for bodily injury to a victim was great, are applicable beyond a reasonable doubt. *See* T.C.A. § 40-35-114(3) and (17). Defendant acknowledges that the trial court independently found that two other enhancement factors were applicable based on

Defendant's prior criminal record, enhancement factor (2), and his prior failures to comply with the terms of a sentence involving release into the community, enhancement factor (9). *See id.* § 40-35-114(2) and (9). Defendant argues, however, that based on the facts and circumstances of the case, a twelve-year sentence is excessive even when considering enhancement factors (2) and (9).

The State concedes that the trial court erred by submitting enhancement factors to the jury, and acknowledges that there is no authority upon which the trial court might rely to conduct these types of bifurcated sentencing proceedings in the case *sub judice*. The State argues, however, that regardless of the manner in which they were presented, the record supports application of the enhancement factors found by the jury. The State contends, therefore, the trial court's error is harmless error. *See* Tenn. R. Crim. P. 52(a).

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Because we conclude that the trial court did not follow Tennessee's sentencing procedure, our review is *de novo* without a presumption of correctness.

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

As a Range I, standard offender, Defendant is subject to a sentence of between eight and twelve years for his conviction of the delivery of more than 0.5 grams of cocaine, a Class B felony. T.C.A. §§ 40-35-112(a)(2). In calculating the sentence for a Class B felony conviction, the presumptive sentence is the minimum sentence in the range if there are no enhancement or mitigating factors. *Id.* § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum in that range, but still within the range. *Id.* § 40-35-201(d). Should there be enhancement and mitigating factors, the trial court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. *Id.* § 40-35-201(e).

Four enhancement factors were submitted for the jury's consideration at the bifurcated hearing: factor (3), Defendant was a leader in the commission of the offense; factor (4), the offense involved more than one victim; factor (11), Defendant had no hesitation about committing a crime when the risk to human life was high; and factor (17), the crime was committed under circumstances under which the potential for bodily injury to a victim was great. T.C.A. § 40-35-114(3), (4), (11), and (17).

At the hearing, Agent Mobley characterized the offense as a "a street-level drug deal" during which Defendant and another person sold drugs to a cooperating individual. Agent Mobley said that Defendant "orchestrated" the deal by setting up the purchase and bringing the buyer to the ultimate seller of the drugs. Agent Mobley said that he was familiar with the individuals that lived in the vicinity of Patterson Road, and that the individuals who were involved with the sale of drugs carried guns. Agent Mobley characterized the residents of Patterson Road who did not participate or encourage the sale of drugs as "victims." Because of the presence of guns, Agent Mobley said that the risk to human life was always high when a drug deal was conducted because "you can never know what can happen."

The trial court then excused the jurors, and the following proceedings were conducted out of the presence of the jury. David Pratt, with the Tennessee Board of Probation and Parole, prepared Defendant's presentence report. Mr. Pratt testified that after the first report was completed, he discovered that Defendant had a prior felony criminal conviction under a different name. Mr. Pratt said that when he initially submitted a request for information from the Tennessee Offender Management Information System, he learned that Defendant's information was similar to that of Marcus Gary Jones who had been convicted of a felony in Williamson County in 1990. Mr. Pratt said that the information for "Marcus Gary Jones" reflected a slightly different birth date and social security number. Defendant initially denied that he had used the name "Marcus Gary Jones," but eventually acknowledged that he had been convicted of a felony drug offense in 1990 under that name. Mr. Pratt filed an amended presentence report reflecting this conviction.

Mr. Pratt said that Defendant was sentenced to one year confinement for his 1990 felony drug conviction, all of which was suspended and Defendant placed on probation for two years. A violation of probation warrant was filed on July 19, 1991, alleging that Defendant had failed to comply with various terms of his probation. The warrant, however, was not served until shortly before the sentencing hearing because of the discrepancies in names. The presentence report reflects thirteen prior misdemeanor convictions listed under the name, "Gary L. Jones," including, among others, four convictions for unlawful possession of drug paraphernalia, two convictions for simple possession of marijuana, and one conviction of resisting arrest. On each of his misdemeanor convictions, Defendant was sentenced to a limited number of days in confinement and then placed on probation, or his sentence was suspended in its entirety and he was placed on probation. Defendant's probation arising out of his 1998 convictions for resisting arrest and unlawful possession of drug paraphernalia was revoked in 1999. Defendant's probation arising out of his 2000 conviction for driving with a revoked license was revoked on December 5, 2000.

The jury found as enhancement factors that the defendant was a leader in the commission of the crime, and that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. *See* T.C.A. § 40-35-114(3) and (17). In addition, upon consideration of the record, the trial court found that Defendant has a history of criminal convictions in addition to those necessary to establish the appropriate range and has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community. *See id.* § 40-35-114(2) and (9). The trial court did not find that any mitigating factors were applicable. Based on the presence of four enhancement factors, and no mitigating factors, the trial court sentenced Defendant to twelve years confinement as a Range I standard offender.

We agree that there is no statutory authority for conducting a bifurcated sentencing hearing as was done in the case *sub judice*. In determining the length of Defendant's sentence, the trial court specifically considered the two enhancement factors found by the jury. However, the trial court also found, upon considering the principles of sentencing and the facts and circumstances of the case, that enhancement factors (2) and (9) were applicable in determining the length of Defendant's sentence based on Defendant's lengthy criminal history and his previous unsuccessful attempts to comply with the terms of his probated sentences. *See* T.C.A. § 40-35-114(2), (9). Nonetheless, even if it was error for the trial court to consider the enhancement factors found appropriate by the jury, the two enhancement factors found applicable by the trial court, enhancement factors (2) and (9), upon consideration of the relevant sentencing principles, are sufficient to support the sentence imposed.

In *Gomez*, our Supreme Court concluded that "[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Gomez*, 163 S.W.3d at 661. Upon the finding of even one enhancement factor, "the statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range." *Id*. at 659.

Based on the presence of the two enhancement factors determined by the trial court to be applicable, and no mitigating factors, we conclude that the trial court did not err in sentencing Defendant to twelve years for his conviction of the delivery of more than 0.5 grams of cocaine. Thus, any error in conducting a bifurcated sentencing hearing was harmless error. *See* Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE